

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0915**

State of Minnesota,
Respondent,

vs.

Christopher Todd Smith,
Appellant.

**Filed May 8, 2023
Affirmed in part, reversed in part, and remanded
Reilly, Judge**

Hennepin County District Court
File No. 27-CR-21-8534

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Mary F. Moriarty, Hennepin County Attorney, Jonathan P. Schmidt, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Michael McLaughlin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Reilly, Judge; and Bryan, Judge.

NONPRECEDENTIAL OPINION

REILLY, Judge

In this direct appeal from judgments of conviction for one count of first-degree drug possession and six counts of possession of child pornography, appellant argues the district court (1) refused to exercise its sentencing discretion when it denied his motion for a

mitigated downward dispositional departure, and (2) erred by entering convictions for five of his six possession of child pornography offenses. We affirm in part because the district court neither failed to exercise nor abused its discretion in sentencing. However, we reverse in part and remand because appellant's multiple convictions violate Minn. Stat. § 609.04 (2020).

FACTS

In December 2020, police executed search warrants on the home, person, and vehicle of appellant Christopher Todd Smith after receiving a tip from the National Center for Missing and Exploited Children (the Center). The Center alerted police to child pornography saved to Smith's Dropbox accounts.¹ In Smith's car, officers discovered 55 grams of methamphetamine. Officers seized Smith's computers and digital media. During a forensic examination of Smith's computers and online accounts, officers discovered over 10,000 files containing child pornography, including 3,000 files that contained victims known to the Center. Officers also found over 20,000 files of child erotica or pornography where the ages of the victims were not readily apparent but appeared underage.

In May 2021, respondent State of Minnesota charged Smith with one count of first-degree possession of a controlled substance and six counts of possession of child pornography. The complaint alleged Smith possessed the methamphetamine and pornography on or about December 10, 2020. But the complaint did not allege that each

¹ Dropbox is a company that provides online accounts for the storage and sharing of electronic files, including photos, documents, and videos. *See State v. Pauli*, 979 N.W.2d 39, 43 (Minn. 2022).

child pornography count involved a different victim. Smith enrolled himself in sex-offender treatment at Alpha Emergence Behavioral Services (Alpha). Alpha diagnosed Smith with unspecified paraphilic disorder, depression history, and schizoaffective disorder by history. Smith attended 12 sessions at Alpha but then missed sessions and dropped out of the program.

Smith pleaded guilty to all charges. When establishing the factual basis to support his plea, Smith admitted he had “six images of pornography involving minors” that he “possess[ed] through [his] Dropbox account.” Smith did not admit that the six images depicted different victims. The district court ordered a psychosexual evaluation and presentencing investigation report (PSI). Smith’s psychosexual evaluation concluded Smith was at an above average risk to reoffend and recommended he participate in sex-offender treatment. Four months before his sentencing hearing, Smith reenrolled at Alpha but failed to attend his first group session. Smith also completed an outpatient chemical-dependency treatment program at Fairview Health.

Smith moved for a mitigated dispositional sentencing departure before his sentencing hearing. He argued that he was particularly amenable to sex-offender treatment and probation. The state opposed Smith’s motion. In anticipation of the sentencing hearing, the district court also requested briefing from the parties on whether Smith could be convicted and sentenced on all six child pornography charges.

At the sentencing hearing, the district court heard arguments from both parties. The district court also reviewed the PSI and addendum, a report from Alpha, a chemical-dependency treatment letter, the psychosexual evaluation, letters from Smith and his

family, and various documents from the Center. The district court stated that it was impressed by Smith's effort to get himself into treatment, but unimpressed with the progress he made at Alpha. The district court found there were no substantial and compelling grounds to grant Smith's departure motion.

The district court also noted it believed the case was "incorrectly charged with respect to the pornography counts." The district court found that the pornography counts were part of a single behavioral incident because the offenses occurred on the same date and Smith had a singular criminal objective of building a collection of pornographic material. The district court also found that the state failed to meet its burden of establishing that there were six different victims to support sentencing Smith on all six child pornography counts. As a result, the district court entered convictions on all six possession of child pornography counts but only imposed a 25-month stayed presumptive sentence on one count. The district court also sentenced Smith to 78 months in prison for first-degree possession of a controlled substance. After the hearing, the district court issued a sentencing memorandum to summarize its sentencing decisions pronounced from the bench.

This appeal follows.

DECISION

- I. The district court did not abuse its discretion or fail to exercise its discretion when it denied Smith's motion for a mitigated downward dispositional departure for the controlled-substance crime.**

The Minnesota Sentencing Guidelines establish presumptive sentences for felony offenses and seek to "maintain uniformity, proportionality, rationality, and predictability

in sentencing.” Minn. Stat. § 244.09, subd. 5 (2022). Sentences prescribed by the sentencing guidelines—or presumptive sentences—are “presumed to be appropriate” in every case. Minn. Sent’g Guidelines 2.D.1 (2020); *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014). A district court must impose the presumptive sentence or a sentence within the presumptive range unless there are “identifiable, substantial, and compelling circumstances” that support a departure from the guidelines. *Soto*, 855 N.W.2d at 308.

A mitigated dispositional departure occurs when the sentencing guidelines recommend a prison sentence, but the district court stays the sentence. Minn. Sent’g Guidelines 1.B.5.a.2 (2020). A downward dispositional departure may be based on a defendant’s “particular amenability to individualized treatment in a probationary setting.” *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). “Numerous factors, including the defendant’s age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family, are relevant to a determination whether a defendant is particularly suitable to individualized treatment in a probationary setting.” *Id.* The existence of mitigating factors does not require the district court to depart from the presumptive sentence. *See State v. Pegel*, 795 N.W.2d 251, 253-54 (Minn. App. 2011).

We review the district court’s sentencing decision for an abuse of discretion. *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016). We affirm the district court’s “imposition of a presumptive guidelines sentence when the record shows [that] the sentencing court carefully evaluated all the testimony and information presented before making a determination.” *State v. Johnson*, 831 N.W.2d 917, 925 (Minn. App. 2013), *rev. denied*

(Minn. Sept. 17, 2013). A district court’s refusal to depart from the guidelines will be reversed only in “rare” cases. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

On appeal, Smith’s argument mainly focuses on his first-degree possession of a controlled-substance offense. Smith moved for a mitigated downward dispositional departure on all charges before the district court determined Smith could only be sentenced on one child pornography count. This decision rendered a mitigated dispositional departure unnecessary on his child pornography offense because the corresponding presumptive sentence was a 25-month stay. *See* Minn. Sent’g Guidelines 1.B.5.a.2 (“A mitigated dispositional departure occurs when the Guidelines recommend a prison sentence but the court stays the sentence.”). But the presumptive sentence for his controlled-substance offense was a commitment to prison and thus eligible for departure. Smith asserts the district court erroneously focused on factors related to his child pornography offense in considering his departure motion and failed to exercise its sentencing discretion to depart on Smith’s controlled-substance offense. Smith relies on *State v. Curtiss* to argue that the district court made a reversible error when it decided he did not deserve a departure based on behavior related to the offenses that were ineligible for departure and “the departure topic was abandoned before the [district] court exercised its broad discretion” as to his controlled-substance offense. 353 N.W.2d 262, 263 (Minn. App. 1984).

The district court did articulate reasons for and against departure at the sentencing hearing and in its explanatory memorandum that discussed Smith’s inconsistent performance in sex-offender treatment and the seriousness of his child pornography offenses. But we do not agree the district court failed to exercise its sentencing discretion

when ruling on Smith's departure motion. We are not persuaded by Smith's reliance on *Curtiss*.

In *Curtiss*, an 18-year-old defendant stole beer from the breezeway of an occupied house while on probation and was charged with first-degree burglary. *Id.* The district court denied the defendant's request for a downward durational departure to an 18-month sentence, reasoning there were "no justifiable reason[s] to deviate" and sentenced him to 33 months in prison. *Id.* On appeal this court remanded for resentencing, noting the departure analysis was "abandoned before . . . comparing reasons for and against departure" and concluded "[t]his is not that rare case where we interfere with the exercise of discretion, but a case where the exercise of discretion has not occurred." *Id.* at 263-64.

Unlike *Curtiss*, the district court did not abandon the reasons for and against a mitigated dispositional departure on Smith's controlled-substance offense. We affirm "the imposition of a presumptive guidelines sentence when the record shows [that] the sentencing court carefully evaluated all the testimony and information presented before making a determination." *Johnson*, 831 N.W.2d at 925. Here, the district court stated that it "reviewed the [PSI and addendum], memoranda submitted by both counsel along with attached exhibits . . . the psychosexual evaluation . . . reports and letters from [Smith] and [Smith's] family, [and] the Alpha report" before making its sentencing decision. These materials contained information relevant to Smith's methamphetamine possession. The district court's sentencing memorandum revealed that it also reviewed letters from Smith's chemical-dependency treatment provider and Narcotics Anonymous sponsor.

At the time of the sentencing hearing, Smith had around seven months of sobriety. Smith stated his judgment was clouded by drug use at the time of his offenses and argued his completion of outpatient chemical-dependency treatment and praise from his sponsor supported his departure motion. The district court stated it was “impressed with the fact [Smith] got [himself] into treatment.” Smith’s PSI indicated he struggled with drug addiction and bought the 55 grams of methamphetamine seized from his car to have a consistent supply to use during the pandemic. The PSI also noted Smith participated in multiple inpatient and outpatient chemical-dependency treatment programs over the years and his addiction played a large role in his housing and employment instability.

On this record, we conclude the district court carefully evaluated testimony and information related to Smith’s addiction, past and current treatment, and recent sobriety. Although the district court could have more thoroughly addressed these factors in its sentencing memorandum, its failure to do so is not an abuse of discretion or failure to exercise discretion. *See State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985) (noting an explanation is not required when a district court denies a departure and imposes a presumptive sentence as long as it considers the reasons for or against departure). Further, the district court permissibly considered Smith’s lack of engagement and inconsistent performance in sex-offender treatment as factors relevant to whether he is particularly amenable to treatment and probation on his controlled-substance offense. The district court noted his performance “[does not] demonstrate . . . [Smith is] appropriate for probation.”

Because the district court did not fail to exercise its discretion or abuse its broad sentencing discretion when it determined substantial and compelling circumstances did not support Smith's requested downward dispositional departure, we affirm.

II. The district court erred by entering convictions on all six possession of child pornography counts.

Both parties agree that the district court erred when it entered convictions on all six possession of child pornography counts and five of the convictions must be reversed because they are barred by Minn. Stat. § 609.04. We also agree.

A criminal defendant “may be convicted of either the crime charged or an included offense, but not both.” Minn. Stat. § 609.04, subd. 1. An included offense is a lesser degree of the same crime or “a crime necessarily proved if the crime charged were proved.” *Id.*, subd. 1(4). But the protections of section 609.04 will not apply if the offenses constitute separate criminal acts. *State v. Bertsch*, 707 N.W.2d 660, 664 (Minn. 2006). The inquiry into whether two offenses are separate criminal acts is analogous to an inquiry into whether multiple offenses constitute a single behavioral incident under Minn. Stat. § 609.035 (2020). *Id.* (“Factors considered when analyzing whether conduct is a single behavioral incident include time and place and whether the . . . conduct . . . was motivated by an effort to obtain a single criminal objective.” (quotation omitted)). The state has the burden of proof. *State v. Williams*, 608 N.W.2d 837, 841 (Minn. 2000). We review de novo whether a defendant's multiple convictions violate Minn. Stat. § 609.04. *State v. Cox*, 820 N.W.2d 540, 552 (Minn. 2012).

First, it is clear Smith was charged with and convicted of six violations of the same possession of child pornography statute, Minn. Stat. § 617.247, subd. 4(a) (2020). These multiple convictions fall under section 609.04 as each offense requires proof of the same elements. *See* Minn. Stat. § 609.04, subd. 1(4).

Second, the district court analyzed whether it could impose a sentence on each of Smith's six child pornography counts under Minn. Stat. § 609.035. The district court concluded the state did not meet its burden of proof and determined all of Smith's pornography possession counts were part of a single behavioral incident because the offenses occurred on the same date and Smith had a singular criminal objective of building a collection of pornographic material. We agree. In its complaint, the state alleged Smith possessed the six images on or about December 10 using his personal computers and online accounts. During his plea hearing, Smith admitted he knowingly possessed the images and affirmed the allegations in the complaint were accurate. But he did not admit, nor did the state prove, he downloaded or possessed the images at different times. Smith also described his purpose in obtaining the pornography was to "build a collection." Thus, Smith's child pornography offenses were part of a single behavioral incident and did not constitute separate criminal acts. *See Bertsch*, 707 N.W.2d at 664.

Even if the offenses are not separate criminal acts, the multiple-victim rule allows defendants to be sentenced for multiple convictions of possessing child pornography when the crimes affected more than one victim. *State v. Rhoades*, 690 N.W.2d 135, 139 (Minn. App. 2004); *see also Munt v. State*, 920 N.W.2d 410, 418-19 (Minn. 2018) (describing the multiple-victim rule). Here too, the state failed to meet its burden. While Smith

acknowledged during his plea hearing that over 3,000 files in his possession contained images of victims known to the Center, the state failed to introduce evidence that there were six unique victims to support Smith's six charges. Smith made no such admission. The district court noted the state had "an opportunity in drafting the complaint, in asking follow-up questions at the plea hearing, in both sentencing memoranda, and on the record at all three sentencing hearings" to establish there were different victims involved and failed to do so. As a result, the multiple-victim rule does not apply. Smith's multiple convictions for possession of child pornography violate section 609.04 and five of the six convictions must be vacated.

Affirmed in part, reversed in part, and remanded.